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MEMORANDUM

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Zoning & Religious Land Use

In general, churches and religious organizations must submit to the same zoning laws as other organizations. Unfortunately, churches and religious organizations are regularly discriminated against on the face of zoning codes and in the highly individualized process of land use regulation. One example is the enactment of land use regulations to prevent churches and other tax-exempt organizations from building in certain areas in order to increase tax-revenue. While this is often the primary motivation for the ordinances, cities rarely admit it, and justify the regulation(s) on other grounds. Another common example is local governments' exclusion of churches and religious organizations in places where theaters, nonreligious organizations and clubs or meeting halls are permitted.

Religious assemblies, especially smaller or unfamiliar ones, also may be illegally discriminated against on the face of zoning codes or in the highly individualized and discretionary processes of land use regulation. Zoning codes and landmarking laws may illegally exclude religious assemblies in places where they permit theaters, meeting halls, and other secular meetings. The zoning codes or landmarking laws may also permit religious assemblies only with individualized permission from the zoning board or commission. Zoning boards and commissions often use that authority in illegally discriminatory ways.

Fortunately for religious institutions, there is a federal law to address this discrimination. The Religious Land Use and Institutionalized Persons Act (RLUIPA) was passed by Congress in 2000 to protect churches and religious organizations from land use regulations that interfere with their religious exercise. When enacting RLUIPA, Senators Hatch and Kennedy reiterated these concerns:

> The right to build, buy or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes . . . Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes

> frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000). RLUIPA prohibits zoning and land use laws that place a substantial burden on the religious exercise of churches and other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest. In addition, and as the U.S. Department of Justice succinctly summarizes on its website, RLUIPA also prohibits zoning and landmarking laws that:

> (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions;
> (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination;
> (3) totally exclude religious assemblies from a jurisdiction; or
> (4) unreasonably limit religious assemblies, institutions, or structures, within a jurisdiction.

U.S. Dep't of Just., *Religious Land Use and Institutionalized Person Act, How to Report?* (June 6, 2023), https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act. The two most common RLUIPA violations are discussed in more detail below.

RLUIPA's Equal Terms Provision

RLUIPA forbids the disparate treatment of religious organizations, and requires that a "religious assembly or institution" be treated on "equal terms with a nonreligious assembly or institution." Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(b)(1). As such, a land use or zoning regulation will violate the equal terms provision if it treats religious assemblies or institutions worse than secular assemblies or institutions that are similarly situated as to the regulatory purpose. *Summit Church v. Randolph Cnty. Dev. Auth.*, No. 2:15-CV-82, 2016 U.S. Dist. LEXIS 25665, at *6-7 (N.D. W.Va. 2016) (adopting the Third Circuit's analysis in *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 264-66 (3d Cir. 2007)). The equal terms provision is violated "when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria." *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1173 (9th Cir. 2011).

Most often, an equal terms violation occurs when a local government seeks to exclude a church or religious organization from a particular zoning area in which similar uses such as theaters, museums and nonreligious clubs are permitted. For example, in *Centro Familiar Cristiano Buenas Nuevas*, Yuma City's zoning ordinance permitted numerous uses by right including membership organizations, while requiring religious organizations to obtain a conditional use permit in the same zoning district. *Id*. at 1173-74. The Ninth Circuit held that the city's ordinance treated religious organizations on a less than equal basis and violated the equal terms provision of RLUIPA. *Id*. at 1174-75. In *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 847 (7th Cir. 2007), the Seventh Circuit similarily acknowledged that RLUIPA forbids a local government from

imposing or implementing a land use regulation in a manner that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." *See also Corp. of the Catholic Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163, 1169-70 (W.D. Wash. 2014) (holding that a city's differential treatment of a private religious school compared to that of a public school with regards to certain zoning regulations is a violation of RLUIPA's equal terms provision); *Covenant Christian Ministries, Inc. v. City of Marietta,* 654 F.3d 1231, 1245-46 (11th Cir. 2011) (holding, in part, that a municipality could not allow private parks, playgrounds, and neighborhood recreation centers in a residential district, while simultaneously excluding churches).

RLUIPA's Substantial Burden Provision

Section 2000cc(a)(1) of RLUIPA provides that,

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution
>
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.

What constitutes a "substantial burden" under RLUIPA?

RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). RLUIPA further provides that the "use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B).

There is no bright-line rule as to what constitutes a "substantial burden;" rather, a "case-by-case, fact-specific inquiry [is necessary] to determine whether the government action or regulation in question imposes a substantial burden on an adherent's religious exercise . . . ." *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004). Several courts agree, however, that a land use provision imposes a substantial burden where great restriction or onus is placed on religious exercise. *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1003 (6th Cir. 2017). *See also Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). In *Livingston Christian Schools*, the court also noted that "land-use regulations can prohibit a plaintiff from engaging in desired religious behaviors, causing some courts to define a substantial burden as something that places significant pressure on an institutional plaintiff to modify its behavior." *Id.* at 1004 (citation ommitted).

Several factors may be considered in determining whether a substantial burden exists (or does not exist), including, for example, when an alternative option "require[s] substantial 'delay, uncertainty, and expense.'" *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (citation omitted). Additionally, in *Riverside Church v. City of St. Michael*, 205 F. Supp. 3d 1014, 1033-34, (D. Minn. 2016), the court explained that "a substantial burden exists if a government action pressures a religious institution to change its behavior" or "when the

government enforcing the land use regulation [for example] acts unreasonably." Moreover, in *Livingston Christian Schs.*, 858 F.3d at 1006, the court discussed cases in which the plaintiffs "were unable to carry out some core function of their religious activities due to the inadequacy of their current facilities."

In *Livingston Christian Schs.*, 858 F.3d at 1004, the court also noted, in contrast, that,

> [W]hen a plaintiff has imposed a burden upon itself, the government cannot be liable for a RLUIPA substantial-burden violation. For example, when an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes, the hardship that it suffered when the land-use regulations were enforced against it has been deemed an insubstantial burden.

Furthermore, in *Petra Presbyterian Church*, 489 F.3d at 851, the court explained that a ban on a church in an industrial zone "cannot in itself constitute a substantial burden on religion, because then every zoning ordinance that didn't permit churches everywhere would be a prima facie violation of RLUIPA."

While a land use regulation that makes religious exercise more expensive or difficult is less likely to constitute a substantial burden, *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, No. 1:10-CV-00082-AT, 2011 U.S. Dist. LEXIS 116945, at 55-56 (N.D. Ga. 2011), "a land use regulation that completely bars the use of the property for religious exercise may constitute a substantial burden." *See also DiLaura v. Twp. v. Ann Arbor*, 112 Fed. Appx. 445, 446 (6th Cir. 2004) (finding that "designation as a bed and breakfast would have effectively barred the plaintiffs from using the property in the exercise of their religion and, hence, the defendants' refusal to allow a variance constituted a substantial burden on that exercise"); *Lighthouse Cmty. Church of God*, No. 05-40220, 2007 U.S. Dist. LEXIS 28, 2007 WL 30280 at *22-24 (finding that plaintiff "established a *prima facie* case of a RLUIPA violation by demonstrating that the application of the parking ordinance imposes a substantial burden on [p]laintiff's religious exercise" (i.e., the parking ordinance prohibited plaintiff from using the building); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1226 (C.D. Cal. 2002) (determining that "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion").

When does a regulation not satisfy the compelling interest and least restrictive means test?

"Under RLUIPA, once a religious institution has demonstrated that its religious exercise has been substantially burdened, the burden of proof shifts to the municipality to prove it acted in furtherance of a compelling governmental interest and that its action is the least restrictive means of furthering that interest." *Westchester Day Sch.* 504 F.3d at 353. Courts agree that insufficient interests for imposing a substantial burden under RLUIPA include "safeguarding the heritage of the City . . .; stabilizing and improving property values . . . ; fostering civic beauty . . . and promoting the use and preservation of historic districts, and/or sites for the education, welfare, and pleasure of the residents of the City." *Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996). *See also Open Homes Fellowship, Inc. v. Orange Cnty.*, 325 F. Supp. 2d 1349, 1361-62 (M.D. Fla. 2004) (determing that there was no rational basis for the county's "denial of the special exemption based on traffic and related trash problems").

The generation of tax revenue has also been deemed an insufficient reason for imposing a substantial burden on religious exercise. *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1203. In *Cottonwood Christian Ctr.*, the court explained, "[s]o universal is the belief that religious and educational institutions should be exempt from taxation that it would be odd indeed if we were to disapprove an action of the zoning authorities consistent with such belief and label it adverse to the general welfare." *Id.* at 1228 (internal citation omitted). The court also noted that substantially burdening religious practice is rarely the least restrictive means of furthering the government's interest in revenue generation: "[m]unicipalities have numerous ways of generating revenue without preventing tax-free religious land uses." *Id.* at 1229.

For more information, you can visit the Department of Justice's website at https://www.justice.gov/media/956061/dl?inline for a detailed *Statement of the Department of Justice on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (Questions and Answers*, June 13, 2018).

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